IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

W. T. DOVELL,
Walla Walla, Washington,
Attorney for Defendants in Error.

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STATEMENT.

This case was begun on the 6th day of November 1895 and after continuances were repeatedly had at the instance of the government, was finally tried on November 15, 1899. At that time a judgment of non-suit was entered at the close of plaintiff's case. A writ of error was had to this court, and on October 8, 1900 the cause was reversed and remanded to the Circuit Court for further pro-

ceedings in accordance with the opinion of this Court which was published at that time in 104 Federal, page 669 and is found in the record at page 26.

At the November 1900 term of the Circuit Court the parties went to trial again. The government after it had presented the identical evidence offered upon the former trial and no more, closed its case. Strictly obeying the mandate of this Court and submitting to the law of the case as defined by the opinion, the defendants in error consented to a verdict against them for the five dollar item of fine included in the account and asked for a judgment of non-suit as to the other items. Such a judgment was entered and the government has sued out a second writ of error, *assigning practically the same error as was assigned upon the first appeal.*

ARGUMENT.

We will notice only briefly the assignment of error in the refusal of the Court to grant a continuance because of the absence of the witness Ford. We were so anxious to have this matter determined that we consented to another trial although we doubted if the Government was entitled to it under the mandate. The trial was set for May 9, 1901, *at the request of Attorney for Government*, (record page 51). The learned trial judge was familiar with the dilatory course that had been pursued by the Government since these cases had been begun. No showing was made of due diligence to obtain the testimony of Ford. He resided beyond the limits where he could be compelled

to respond to a subpoena. The cases had been pending and had been at issue for years and no effort had been made to obtain his deposition. The presumption is that no such effort ever would be made. The rule is familiar that when due diligence has not been used to obtain a deposition of an absent witness, and the Court is not assured that such witness will be present at a subsequent term a continuance should be refused. No less familiar is the rule that the granting or refusal of a continuance is within the discretion of the trial judge and no error can be predicated upon his exercise of that discretion unless an abuse of it is apparent.

4 Encyclopoedia of Pleading and Practice, pp. 835, 859.

With a charming nonchalance, the Attorney for the Government disregards the opinion of the Court *rendered upon the same facts in the same case* and attempts to argue anew the matters involved in the first appeal. When the Court said in its opinion "The Court was therefore right in holding that the documents offered in evidence by the plaintiff were legally insufficient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract," that statement became the law of the case. The lower court followed that law in its ruling upon the second trial and now the attorney for the government assigns that ruling as error in the very Court which announced it.

Whatever has been decided upon one writ of error or appeal can not be reviewed upon a second writ of error or appeal brought in the same suit. The first decision has become the settled law of the case. This is the statement of a rule laid down long ago by the Supreme Court of the United States, followed uniformly there and in all the Federal Courts and as nearly as the writer has been able to ascertain in the Appellate Court of all the States unless it be Nebraska, Texas, Utah and Missouri.

As a few of those cases we cite:

Thompson vs. Maxwell Land Grant & R. Co., 168 U. S. 451.

Great Western Telegraph Co., vs. Burnham, 162 U. S. 339.

Northern Pac. R. R. Co., vs. Ellis, 144 U. S. 458.

Clark vs. Kieth, 106 U. S. 464.

Supervisors vs. Kennicott, 94 U. S. 498.

Wright vs. Columbus H. V. & A. R. Co., 20 Sp. Ct. Rep. 398.

An exhaustive note upon the effect of this rule is found in 34 L. R. A. 321.

Further citation of authority upon this well established principle would not be in place as this Court has clearly adopted it in

Matthews vs. Columbia Nat. Bank, 100 Fed. 393.

No application for a review or rehearing of the former decision of this Court was made. The learned counsel for Government has now filed a brief in which he urges no new reason and cites not a single authority which was not called to the Court's attention at the former hearing but seeks by a transparent paraphrase of the argument used before to overturn what has become the law of the case by virtue of the opinion and mandate of this Court.

There being no question involved except what was brought up and considered by the Court upon the former writ of error, we respectfully ask that this appeal be dismissed without a hearing upon the propositions submitted in the brief of plaintiff.

For the purpose of keeping our whole case together, but with the prayer that we may not be deemed contemptuous in repeating an argument upon propositions already decided by this Court in this case, we print the substance of the argument used by us upon the former hearing of this cause.

A material allegation of the complaint, put in issue by the general denial was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract and did fail and refuse to perform the same." This allegation so denied must be proved by the plaintiff. Were the transcripts from the department unassisted sufficient to prove this?

For the convenience of the Department in the administration of public business it has been found necessary to provide that when adjustments are made by the proper officers of the Department such adjustment of account shall be taken as prima facie correct by the Court in which judgement is sought, and this, we believe, is as far as the law makers intended to go. It is charged in the complaint that the contract entered into between the defendants in error and the United States was broken by the failure of McCoy to carry the mails according to the contract. This is a matter of which the Auditor of the Postoffice Department has absolutely no knowledge. In order for the Government to recover in this case it must prove that McCoy failed to carry the mails as he had agreed. Can it be said that the sixth Auditor of the Treasury may, sitting in his office in Washington City, make a charge upon his books against a contractor and by certifying the transcript of that charge to some judicial tribunal establish the fact that the contractor who had agreed to carry the mails in the city of San Francisco had failed to so carry them?

Before the Government can recover there must be established in this case a substantive fact, namely, that McCoy failed to comply with his contract. After they have established that substantive fact it is probably true that a statement such as exhibit B would establish prima facie amounts lost by the Government on account thereof.

We call the Court's attention to the case of the United States vs. Case, 49 Fed. Rep., 270. Our idea of the meaning and effect of this statute is well expressed in this case.

"If this sweeping and arbitrary power is to be conceded to the officers of the Department, they would as well have made the deficiency twice or three times as great as it is. They have only to make a charge, no matter how unfounded it may be, and have it certified, and the postmaster and his bondsmen are without remedy. . . . It is thought, however, that it was not the intention of the law that executive officers should be clothed with the power thus to usurp the province of court and jury and decide finally and irrevocably questions of facts upon ex parte and hearsay statements. Such power is not found in the section of the statute referred to."

What could be a more flagrant violation of the simplest rules of justice than to say that the Auditor of the Post-office Department can make out a prima facie case against the defendant in error merely by signing such a certificate as exhibit "B?" How does *he* know there was a violation of the contract? His means of knowledge is set out in the record at page 93. It consists of two telegrams signed "Backus, Posmaster." In other words, the Second Assistant Posmaster General at Washington, D. C., received the telegrams bearing the name of Backus, Postmaster, stating that route No. 76475 was down. Upon evidence which is worse than hearsay, for he has no personal knowledge of the fact, and no means of knowing by whom this telegram was actually sent, he certifies his knowledge thus obtained to the Auditor of the Treasury, and upon that the Auditor makes a certificate and the Government without further evidence, seeks judgement against the contractor. We believe no such construction of the statutes is warranted

United States vs. Forsythe, 6 McLean, 584; Fed. Case No. 15123.

As was well stated in the case of United States vs. Burford, 3 Peters, 12: "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the Department, where the transactions are shown by it books. In these cases the officers may well certify, for they must have official knowledge of the facts stated."

In the case of United States vs. Smith, 35 Fed., page 490, the Court refused to charge an Indian Agent under section 886 R. S. upon a transcript containing a charge in gross, because "the transcript of a consolidated account does not show of what the property consisted, nor the manner in which the value of the same was ascertained."

In the case at bar the records show that the fact of delinquency of the contractor was ascertained by incompetent evidence and we believe the reasoning in the case last cited may be well applied to the case at bar. We cite further in support of our contention:

United States vs. Jones, 8 Peters, 375.

United States vs. Patterson, Gilp, 47, Fed., Case No. 16008.

United States vs. Edwards, 1 McLean, 463, Fed. Case No. 15026.

United States vs. Parr, 132 U. S., 644.

The case last cited answers the contention that may be made by plaintiff in error that the Court has the right to rely upon the presumption that public officers have done their duty and that this contract would not have been relet, nor a charge made aginst McCoy if he had not defaulted. The language approved by the Supreme Court is as follows: "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact."

Plaintiff in error relies upon three principal cases to support its contention. Soules vs. United States, 100 U. S., 8; United States vs. Dumas, 149 U. S., 278; United States vs. Stone, 106 U. S., 528. All that appears from the Soule case is the holding of the Court that such transcripts are no more than prima facie evidence of the correctness of the balance certified. In that case the transcript purported to be a copy of the account between an internal revenue collector and the United States. The point properly decided in that case is that accounting officers have a right to re-state a balance in order to correct a mistake. We do not think the Dumas case contains anything which can be of any help in the determination of the case at bar. In that case (page 283) it appears that counsel for the

Government alleged as error the failure of the Court below to instruct the jury that the transcript constituted conclusive, rather than prima facie, evidence of the balance due to the United States. The Court holds that the transcript was *at most* prima facie evidence, and it appears (page 279) that the transcript in that case is more full and complete than in this case, inasmuch as it had appended copies of papers pertaining to the account, and we make no doubt that the balances in the case claimed to be due the Government were shown by competent evidence which was attached to the transcript. We believe the closing words of the Stone case will show that the point in controversy did not arise in that case.

We believe there is an additional objection to the last item charged against McCoy in exhibit "B," being the difference between his contract and the contract of a subsequent contractor. Courts of law will not go behind adjustments made by officers of the different Departments when they have proceeded properly in making those adjustments. If it be made to appear to the Court that the officers of the Land Department, or the officers of the Treasury Department, or any other Department of the Executive branch have, in reaching a determination, proceeded upon an erroneous conception of the law, the Court will inquire into the decision and reverse it. We insist it is evident from the face of this account that in charging the last item of $3587.87 to McCoy the officers of the Treasury Department took as a criterion a measure of damage which is not warranted by the law. If McCoy did violate his contract the measure of damage is the difference between

his contract price and the value of the same service in the open market, and the difference between McCoy's contract and the contract price of Max Popper is not the measure of damage; hence it appears that the officers of the treasury Department adopted a wrong standard, an erroneous criterion in their assessment of damages against McCoy, and it should therefore fall. In the case of the United States vs. Patterson, and in some of the other cases heretofore cited, the Court refused to admit in evidence a transcript which contained a charge in gross but did not set forth the whole account and the item from which it arose. How much stronger reason, therefore, for rejecting an item in a transcript which appears to have been illegally made. Suppose this last item was as follows: "To difference between the contract of McCoy at $7700 and the cost of the Spanish-American war," and the difference was charged to McCoy. The absurdity of such a charge would at once appear and it would be stricken out. We insist that the charge in its present shape is just as absurd.

We take it that we need not enlarge at length upon our reason for the contention that the telegrams at page 93 are incompetent. They appear to be copies of telegrams received in the office of the Second Assistant Post Master General. The original papers of which these transcripts are copies would not be evidence, and, as several of the authorities heretofore cited say, no officer can make competent evidence out of incompetent evidence by certifying to it. If it was sought to show that Backus, Postmaster, informed the Department by telegram that the route was down the best evidence of that fact would be the original

telegrams sent by Backus. The papers from which these copies are made are incompetent, therefore the transcripts are incompetent and of no legal sufficiency. In order to convenience the officers of the Government it may be necessary to give them many privileges, but as long as the constitutional provision that property shall not be taken without due process of law remains we imagine that all of the rules of evidence will not be abrogated unless Congress does so in express terms. And until Congress does do so the officers of the Treasury Department will not be able to bundle up a mass of incompetent evidence lying about their respective offices and by attaching a certificate to it send it out to the different Courts of the land and demand that upon that alone judgement shall be entered and execution awarded against the property of a private citizen. The absurdity of their effort to make competent evidence out of incompetent evidence appears in several places in the record. One instance is the telegrams above referred to: Another is the certificate of William O. Fallon, page 54 of the record, which appears to be inserted in the record for the purpose of proving that demand was made upon the bondsmen. The original letter on file in the Department would not be evidence because it would be only hearsay, consequently this copy is not evidence. Upon page 93 is a copy of a letter by which it is evidently sought to prove that notice was served upon C. C. McCoy, but no proof of the mailing of the letter is appended, nor is there any proof that the place to which it purports to have been directed was the place of residence of C. C. McCoy. An elementary knowledge of the principles of the law would suffice to inform the officers of the Department that none

of such matter was legal evidence, and the Court below did not err in granting a judgement of non-suit because of the illegal insufficiency of the evidence upon which the Government rested its case, because it had failed to prove by any competent evidence that McCoy had ever violated the contract he had engaged to perform.

For six years we have come to the bar of the Federal Court twice each year seeking for a judgement that would be final in this and other cases depending upon the same facts the pendency of which has made unstable the fortunes of our clients. In the Government's own good time it went to trial. We prevailed. We followed their writ of error to this Court, and went back to the lower Court to obey its mandate. That there might be an end we met them in another trial to which we do not believe they were entitled. We prevailed again, and again we follow their writ of error. Twice the Government has failed to prove its case after full opportunity given. Once already every question involved has been passed upon by this Court of final resort. There being no new matter assigned, may it please your Honors to dismiss this writ of error and show us an end to this litigation which we are loth to leave as our single heritage to our heirs.

Respectfully submitted

W. T. DOVELL,

Attorney for Defendants in Error..